B. "Separate Officers..." (Section 272(b)(3))

NYNEX demonstrated in its Comments that this provision of the Act cannot be read to preclude the provision of corporate governance functions and administrative services from a holding company or other service entity. AT&T and MCI both argue that the Act precludes this,[60] but point to nothing in the language of the Act which supports their argument that corporate governance functions and administrative services of the kind NYNEX described in its Comments,[61] which the Commission has long considered appropriate for sharing under Computer II, cannot be provided on a centralized basis. Neither AT&T nor MCI make any distinction between corporate governance or administrative functions, on the one hand, and operating functions. NYNEX has not included operating functions in its list of corporate governance functions and administrative services.[62]

C. Separate Credit (Section 272(b)(4))

No rules implementing this requirement are necessary. NYNEX agrees with the Commission's tentative conclusion that "a BOC may not co-sign a contract or any other instrument with a separate affiliate that would allow the affiliate to obtain credit in a manner that violates Section 272(b)(4)."[63] AT&T contends that the Commission should prohibit any arrangement which might permit a creditor of the BOC's Section 272 affiliate to have recourse to

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60 AT&T 24; MCI 28.

61 NYNEX 28-31.

62 Further, neither the decision to "outsource" such a function or not, nor the timing of that decision relative to the passage of the Act, has any relevance to the application of Section 272(b)(3). Contra, MCI 28.

63 NPRM ¶63. Teleport's claim that the Commission has tentatively concluded that the affiliate cannot borrow on the strength of it's parent's signature is thus wrong, unless the affiliate is a subsidiary of a BOC.

the assets of the parent of the BOC.[64] Section 272(B)(4) is explicit -- the separate affiliate may not obtain credit in a way which permits creditors to have recourse to BOC assets. The BOC's parent's assets are distinct, and are not subject to the same restriction.

IV. THE NONDISCRIMINATION PROVISIONS OF THE ACT DO NOT PROVIDE A BASIS FOR NEW REQUIREMENTS AIMED AT SUPPRESSING COMPETITION (NPRM¶¶ 65-89)

In its initial Comments, NYNEX showed that the corporate governance functions and administrative services which may be provided by a holding company or service entity are not subject to the nondiscrimination provisions of Section 272(c), and that the Commission need not adopt any rules in this proceeding to implement the clear and specific authorizations contained in Section 272(e).[65] The Commission should reject the efforts of various commenters to create new and complex definitions of nondiscrimination and burdensome new reporting requirements.

A. Section 272(c)

The recommendations of various commenters on these provisions illustrate the complexity of the task the Commission will face in applying this section. Even if Section 272(c)(1) and (e) authorized the adoption of implementing rules, the variety and complexity of the factual issues which the commenters raise argues in favor of resolving them on a case-by-case basis, as they arise, on the basis of the language and policies of the Act. No useful purpose will be served by attempting to write rules to address circumstances which may never arise, especially if those rules would impose unreasonable burdens on the BOCs, or have the effect of

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[64] AT&T 27, n. 27.

[65] AT&T refers to Section 272(e) as establishing "four separate prohibitions" (p. 35). AT&T is wrong. Section 272(e) authorizes certain BOC activities subject to specified conditions intended to prevent discrimination between its' separate affiliate and others.

preventing the BOC's Section 272 affiliate from becoming an effective competitor to incumbent providers.

One example illustrates this point. AT&T and others argue that BOC compliance with Section 272(c) requires not only that the BOC provide the same services and facilities at the same rates to its affiliate and other carriers, but that it also provide whatever is necessary to effect an "identical functional outcome," in effect offsetting any differences in technical design architecture, software or performance specifications between the networks of the affiliate and of other carrier(s).[66] Adopting this recommendation would depart from the common understanding of the term discrimination,[67] would require differences in the treatment of similarly-situated carriers, and require the BOCs and ultimately the Commission to equalize the differing technical choices of multiple IXCs. Most importantly, these are not distinctions in treatment by the BOC, but differences between the non-BOC (affiliated and unaffiliated) carriers themselves. Although much has been made about the absence of the terms "unjust" and "unreasonable" from the nondiscrimination provisions of Section 272, discrimination has always depended on allegations of different treatment of *similarly-situated* entities. Discrimination does not lie in a BOC's failing to make dissimilar carriers similar, or here "identical."[68]

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[66] AT&T 31, MCI 36.

[67] US West 31-34; BellSouth 32-33.

[68] This is precisely the bizarre result argued for by TRA, which insists that allegations of discrimination cannot be "justified because the technical specifications of the complaining entity's equipment were different..." (TRA16). See, also AT&T 31. There is neither sound law nor sound policy to warrant such a regulatory fiat.

B. Section 272(e)(1)

This straightforward provision requires the BOC to fulfill any requests from an unaffiliated entity for exchange and exchange access services in a period no longer than the period in which it provides such service to itself or to its affiliates. AT&T's claim[69] that, by using the phrase "no longer than," Congress intended to abandon average response times as a means of measuring comparability of service intervals attaches an implausible meaning to that phrase, and should be rejected.[70]

The impracticality of AT&T's proposal is highlighted by the recommendation that the BOCs should be required "...to disclose their response time for each request for service from their affiliates," and "...to disclose...the shortest interval for the response to its own or its affiliates' request for service with respect to each service category, in that these would be the maximum response time for requests by non-affiliates."[71] Because the potential number of factors impacting the provisioning of any individual service request is vast, adoption of AT&T's proposal would plainly impose an enormous operational, analytical and reporting burden on the BOCs, a burden which would overwhelm any theoretical protection such requirements might afford against the BOC actions hypothesized by AT&T.[72] To impose these costs, simply because

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[69] AT&T 36.

[70] No other commenter takes this extreme position. Other commenters do argue that quarterly reports of provisioning intervals should be provided, referring to the Computer II and ONA reports provided today. See e.g., Teleport 14-16, MCI 41.

[71] AT&T 37-38.

[72] It would also result in the public disclosure of detailed information concerning the Section 272 affiliate's business activities which would cause it competitive harm.

of a conjectural harm, is consistent with neither Congressional direction nor good public policy.[73] The Commission should not adopt any additional reports, but if it does they should be analogous to those imposed by Computer II and ONA.

C. Section 272(e)(2)

This provision authorizes the BOCs to provide facilities, services or information concerning its provision of exchange access to its Section 272 separate affiliate, if it makes them available to other providers of interLATA services in that market on the same terms and conditions. No regulations are required to implement this provision. The requirement clearly concerns only exchange access-related facilities, services and information provided by a BOC. Arguments that the BOCs should be required to disclose detailed information concerning each service request by its affiliate[74] are disingenuous and misread the statute, wrongly converting a requirement for disclosure of BOC information into a requirement for disclosure of one's customer's CPNI. AT&T, which would have each BOC publicly disclose highly detailed information concerning the BOC's separate affiliate, believes its own similar information to be per se confidential.[75] Disclosure of detailed data on selected new entrants will injure, not aid, the competitive market. The Commission should ensure that the confidentiality of all carriers' information is respected.

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[73] Indeed, the way that Congress chose to ensure nondiscriminatory conduct was to provide for biennial audits (Section 272(d)).

[74] AT&T 39.

[75] AT&T 35.

D. Section 272(e)(3)

The imputation requirement of Section 272(e)(3) is straightforward. Nevertheless, MCI argues that enforcing it requires the Commission to review the prices or profits of the Section 272 affiliate, a process MCI admits would be "extremely difficult, uncertain and time-consuming...."[76] MCI contends that this effort is required because access charges are priced significantly over cost. The level of access charges is irrelevant. Congress has defined the remedy for MCI's concern-imputation. MCI's request here for disclosure to it and others of detailed information about one of its competitors is anticompetitive, rather than procompetitive.[77]

E. Section 272(e)(4)

AT&T's effort to use this proceeding to suppress BOC competition is nowhere clearer than in its arguments concerning Section 272(e)(4). This section specifically permits a BOC to provide interLATA facilities or services to its authorized interLATA affiliate, if they are provided to all carriers on a nondiscriminatory basis. Congress authorized competition at the wholesale level, it did not preclude it. This provision is thus entirely consistent with the Section 272(a) bar on originating (or retail) interLATA service. Nevertheless, AT&T argues strenuously that this provision does not mean what it says, and that it only authorizes the interLATA services which BOCs are themselves authorized to provide.[78] However, if BOCs are otherwise authorized to provide those interLATA services, Section 272(e)(4) would be unnecessary. BOC provision of interLATA facilities to its affiliate and other carriers, in accordance with Section

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[76] MCI 43- 44, See also CompTel 17, proposing disclosure of all financial data concerning the BOC interexchange affiliate as though it were a publicly traded entity.

[77] See, Section VI. C, infra.

[78] AT&T 43-47.

272(e)(4) does not violate Section 271(b). It does, however, threaten price competition for AT&T and other large IXCs in providing facility-based service to resellers. This is a competitive benefit AT&T deems "irrelevant".[79] AT&T is wrong. Such competition is expressly authorized by Section 272(e)(4) and fully consistent with the *pro-competitive* purposes of the Congress and this Commission.[80] AT&T's concern that the BOC's plan to perform integrated design, development, engineering and construction of these facilities with their Section 272 affiliates is a "red herring." Such integrated operational activities between a BOC and its affiliate are precisely what Section 272(b)(1) forbids.[81] Rather, Section 272(e)(4) permits the provision of wholesale interLATA services, not the joint ownership and operation of those facilities by the BOC and its Section 272 affiliate.

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[79] AT&T 44. AT&T takes it upon itself to call this Congressional authorization "no legitimate interest of any BOC." (AT&T 46). Congress, not AT&T, has made the telecommunications policy determinations effectuated through the Act, and the fact that AT&T would have preferred a different result is irrelevant.

[80] AT&T (Comments 45), MCI (Comments 24-25) and ALTS (Comments 1-5) all express concern that BOCs might use their "official services networks" in providing wholesale interLATA services. ALTS correctly recognizes that the statute does not preclude such use. The statute is procompetitive. It authorizes use of these facilities while it requires that such interLATA facilities or services be made available "to all carriers at the same rates and on the same terms and conditions, and so long as the costs are appropriately allocated."

[81] The very same integrated activities may be performed within the BOC, subject to the safeguards set out in Section 272(e)(4).

V. THE ACT REQUIRES A SEPARATE AFFILIATE WHEN A BOC PROVIDES THE INTERLATA TRANSPORT PORTION OF "INTERLATA INFORMATION SERVICES," BUT NOT WHEN A BOC PROVIDES AN INFORMATION SERVICE AND ANOTHER ENTITY PROVIDES INTERLATA TRANSPORT (NPRM ¶¶31-54)

Section III of the NPRM raises a number of questions concerning when and whether BOC activities are subject to the Section 272 separate affiliate requirements. Two issues arising from the comments are discussed below.[82]

A. The 1996 Act, The MFJ, and The Common Sense Meaning of the Term "Provide" All Make It Clear That For A BOC to "Provide" an "InterLATA [Information] Service," That BOC, and Not Some Third Party, Must Provide InterLATA "Telecommunications"

In our Comments, NYNEX showed that the 1996 Act, the MFJ and common sense all make it clear that, for a BOC to "provide" an "interLATA information service", the BOC must provide the interLATA telecommunications.[83] This conclusion is supported in the comments of all of the parties to the MFJ which addressed the issue,[84] as well as by MCI, the non-party which most frequently participated in MFJ proceedings.[85] A few commenters, however, seek without basis to expand the concept of BOC provision of "interLATA information service" far beyond the definitions set forth in the Act, and hence beyond the MFJ concepts on which the Act is clearly based.

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[82] There are, of course, other issues relating to NPRM ¶¶ 31-54 addressed in the comments of other parties, e.g., the post-1996 Act applicability of current CI-II, CI-III and ONA Rules. Upon review, and in recognition of the Commission's interest in brevity, NYNEX believes that we have fully explored these issues in our comments (pp. 38-50).

[83] NYNEX 42-45.

[84] NYNEX 42-45; see, also AT&T 13-14; Ameritech 67-69; Bell Atlantic Exhibit 1, pp. 3-5; BellSouth 22-23; Pacific Telesis 9-12; U S WEST 9-11.

[85] MCI 17.

For example, without making a single reference to any section of the Act or the MFJ, Sprint claims that it is "impossible" to distinguish between interLATA and intraLATA information services, and that this "leaves the Commission with no alternative" other than to classify essentially all information services as "interLATA".[86] Such alleged "impossibility" is obviously not apparent to any of the parties who for more than a decade dealt with the requirements of the MFJ. Moreover, even if distinguishing interLATA and intraLATA service was difficult in a particular situation, the Commission would not be free to ignore the clear Congressional distinction between interLATA and intraLATA services. In any event, the Act's definitions, especially as interpreted in the light of the MFJ definitions on which they are based, make it clear that for a BOC to provide an "interLATA information service", the BOC itself must provide interLATA "telecommunications".[87]

B. Pending BOC Merger Agreements Do Not Create The Need For Additional Safeguards or Make One BOC An "Affiliate" of the Other (NPRM ¶ 40)

The NPRM seeks comment on "what effect, if any, the entry into a merger agreement by two or more of the BOCs has upon the application of the §§ 271 and 272... separate affiliate and nondiscrimination requirements" to those BOCs. The answer is that there is no effect. Section

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[86] Sprint 17-18. See, also VoiceTel 11-12.

[87] Similarly, the Act's definitions make it clear that an "interLATA information service" must include interLATA telecommunications. The Commission should recognize that all "interLATA information service" MFJ waivers existing as of the date of enactment of the 1996 Act waive only the MFJ's interLATA telecommunications services prohibition (since the information service prohibition had long before been removed from the MFJ and therefore any existing information services waivers and related conditions had become moot). Therefore, because of the specific provision in section 272(a)(2)(B)(iii) of the Act, no MFJ-authorized "interLATA information service" (each of which is authorized only because of an interLATA telecommunications service waiver) requires a separate affiliate. See, NPRM ¶ 34.

272 logically applies only to the relationship between a BOC and its own affiliate, and the interLATA affiliate of a proposed merger partner simply does not meet the ownership or control tests which would make that interLATA entity an "affiliate" of the first BOC (see definition of "affiliate" in Section 3(a)(2)(33)).

This conclusion should not give rise to any regulatory concerns. First, Congress has already adopted numerous mechanisms which operate to prevent unfair discrimination by a BOC in favor of a proposed merger partner.[88] Second, a merger agreement does not modify a BOC's fiduciary duty to its own shareowners (compliance with which is always closely monitored and frequently challenged in a merger context). Finally, discrimination in favor of the proposed merger partner is, in any event, a wholly unlikely corporate strategy in the middle of a Hart-Scott antitrust review process.

For these reasons, no strained interpretation of the term "affiliate" or overlay of additional non-statutory regulatory safeguards is needed.

VI. THE LONG DISTANCE AFFILIATES SHOULD BE RECOGNIZED AS NON-DOMINANT CARRIERS (NPRM ¶¶108-152)

NYNEX earlier showed that by application of every Commission policy and precedent the BOC affiliates authorized by Congress to provide long distance service should be regulated as non-dominant carriers.[89] This form of regulation for the affiliate is not only consistent with

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[88] See, e.g., Section 202 (general nondiscrimination requirements); Section 251(g) of the 1996 Act (continuing enforcement of the MFJ equal access and non-discriminatory interconnection requirements).

[89] NYNEX 50-62.

the 1996 Act, it is necessitated by the very pro-competitive, de-regulatory purpose adopted by Congress to increase in the long distance market competition.[90]

Not surprisingly, many incumbent long distance carriers oppose nondominant regulatory treatment for this new entrant. Significantly, none find any support for their positions in the 1996 Act or Commission precedent. Instead, they largely repeat the speculative concerns of the NPRM without adding substance to those concerns. However, where their arguments are detailed, they address BOC conduct and regulation, and not the regulation of the affiliate. That is, none even attempts to show that the affiliate has market power or, because of that power, should be subject to burdensome dominant carrier regulations contrary to the public interest.

A. The Affiliate Does Not Have Market Power

It is significant that AT&T, MCI and Sprint all agree with NYNEX that there is one domestic product market and one nationwide geographic market.[91] Each believes, however, that a more focused point-to-point analysis is warranted because of the possibility that BOC local exchange market power might be used to create interexchange market power for the affiliate. This serves properly to put the focus on BOC local exchange conduct, and in no way detracts from their acknowledgment that only one geographic interexchange market exists.[92]

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[90] Id. In doing so, NYNEX also dealt with each and every speculative concern raised in the NPRM, and showed that there was no realistic prospect for either successful or undetectable anti-competitive conduct which would permit the BOC itself to exert market power on behalf of the affiliate in the long distance marketplace.

[91] AT&T 61-62 & n. 54; MCI 58-59; Sprint 59.

[92] CompTel takes a different view, arguing that there are two markets, i.e., affiliate-served and other (33-34), but it does not support its point by any evidence or market analysis.

Similarly, there is no dispute that all of the factors customarily used by the Commission to assess a carrier's market power indicate that the affiliate itself is non-dominant. The only discussion of market power presented is whether the BOC can exercise interexchange market power on behalf of its affiliate and, if so, whether dominant carrier regulation is warranted. As discussed below, there is no realistic prospect for the exercise of such market power and dominant carrier regulation is not warranted.

B. There Is No Reasonable Prospect That BOCs Can, And Will Be Able To Exercise Market Power On Behalf Of Their Affiliates

The greatest amount of commenter effort is exerted in an attempt to show that the BOCs and affiliates can hypothetically exercise interexchange market power via anti-competitive pricing.[93] The problem with these hypotheticals is that they are wholly unrelated to market realities.[94] In fact, BOCs are not free to increase access pricing under price-cap regulation; on the contrary, history has shown a substantial and consistent decrease in access pricing. Further, under the terms of Section 251-252 of the 1996 Act, BOCs must now provide alternatives to interexchange access at costs well below those currently available in access rates. What is really at issue is the prospect of lower rates to the public. As above, no major IXC has demonstrated any willingness to compete vigorously with respect to pricing. As observed by Congress, rates go up in lock-step even while access prices are going down. It would be beneficial to

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[93] See, e.g., MFS 3-4, Att. 1.

[94] NYNEX 56-58.

competition and the public -- albeit disturbing to marketplace incumbents -- for BOC affiliates to introduce vigorous price competition to these markets.[95]

With respect to the probability of discriminatory conduct, most commenters simply refer to the Commission's inquiry without adding any substance to the concern.[96] NYNEX has shown that there is no basis for this concern.[97]

C. Dominant Carrier Regulation Of The Long Distance Affiliate Is Contrary To The Public Interest

The Commission has long held that the various attributes of dominant carrier regulation impede the public interest in numerous ways, and must be shown to be otherwise necessary.[98] For these reasons the Commission has now applied a non-dominant form of regulation to all carriers currently providing interstate, interexchange service, including some LEC-affiliated carriers under a form of separation developed in the Competitive Carrier proceeding that is less stringent than the Section 272 criteria now required of the BOCs. Therefore, the Commission

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95 Moreover, to the extent that commenters' analyses seek to rely upon assertions that current access rates are excessive, they fail to observe that the Commission has committed itself to undertaking and completing access reform within the next year.

96 See, e.g., the complete absence of details provided in the response to the Commission's request for comments concerning the potential for discrimination by the BOC by AT&T (p. 63), Frontier (p. 9), and LDDS WorldCom (p. 21).

97 NYNEX at 56-57. Time Warner argues that "strict compliance" with the Section 271 checklist must be assured "prior to permitting BOC in-region interLATA entry." If Time Warner means to argue the details of Section 271 compliance, it is in the wrong proceeding. Alternatively, if it means to delay this infusion of competition into the long distance market by establishing non-statutory restraints, it seeks to reverse contrary legislative judgment. Congress has been very clear that no such delay, beyond the satisfaction of the Section 271 criteria, is to be introduced by competitors gaming the regulatory process.

98 NYNEX 58-60, citing In the Matter of Policy and Rates Concerning Rates for Competitive Common Carrier Services and Facilities Authorization therefore ("Competitive Carrier"), Fifth Report and Order, 98 FCC 2d 1191, 1199 n. 24 (1984).

challenged proponents of dominant carrier regulation of these affiliates to show specifically that such regulation was necessary and beneficial.

Few commenters took up the Commission's challenge.[99] Nevertheless, AT&T and MCI seek to preserve specific aspects of dominant carrier regulation which will protect them against intensified competitive pressures.[100] Specifically, AT&T asks the Commission to apply "price floors, and advance notice and cost support requirements for tariff filings" to "inhibit predation,"[101] yet it never establishes that any realistic prospect for predation exists. Indeed, the NPRM properly dismisses such claims (¶137). Rather, what exists now -- for the first time in many years -- is the real prospect of dynamic price competition. MCI argues that advance tariff filing and detailed support are necessary to ensure that the affiliate is complying with the "imputation" requirement of Section 272(e), requiring the non-discriminatory provision of BOC services. However, it is not necessary for the affiliate's costs to be made available to competitors, or that its marketing efforts be delayed, to serve this purpose; Congress has provided audit requirements for just such purposes. Most importantly, the Commission has specifically recognized that such anti-competitive disclosures and regulatory delay are

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[99] See, e.g. AT&T 65. One clear exception is CompTel which in essence, first re-argues the Competitive Carrier decisions and then the BOC "Out-Of-Region" Order, before concluding inspecifically that the Commission should at least apply dominant carrier treatment in this case.

[100] AT&T; MCI 65.

[101] AT&T 66.

affirmatively harmful to consumers.[102] There is no public interest basis for applying the burdens of dominant carrier regulation to these BOC affiliates.[103]

D. The Affiliates Should Be Regulated As Non-Dominant Carriers In International Markets

There was general agreement in the comments with the Commission's tentative conclusions to treat international service as comprising two product markets, IMTS and non-IMTS, and as a worldwide geographic market (subject to separate consideration where there is an affiliated foreign carrier) in this proceeding.[104] Further, commenters agreed that it would be reasonable to treat the affiliates as dominant or nondominant carriers in international markets as they are treated for domestic long distance services.

MCI goes beyond this general principle, however, to argue that the affiliates should, in any event, be encumbered with additional conditions on their international services similar to those applied by the Commission to MCI as a condition of approval for its ownership and relationship with British Telecom. However, that Commission action adds no support to MCI's

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[102] Competitive Carrier, Fifth Report and Order 98 FCC 2d at 1199.

[103] The representatives of smaller market incumbents take a different approach. Instead of arguing affirmatively for the benefits of dominant carrier regulation, they seek delay in the relaxation of its acknowledged burdens. Thus, TRA argues that "no regulation should be released until competition emerges in the local telecommunications market" (TRA 27), while CompTel argues that Congress has charged the Commission with managing a "transition process" (CompTel 35). However, it is not the Congressional plan to penalize or burden the BOC affiliates with burdensome, anti-competitive regulations. Rather, it is the Congressional charge to enhance competition in these markets quickly, subject to the conditions for long distance market entry and participation specifically articulated in Sections 271-272.

[104] See, e.g., NYNEX 60-61, AT&T 66-67.

request for anti-competitive constraints herein.[105] Given direct and continuing Commission jurisdiction as nondominant carriers, there is no basis to encumber them ab initio with special, burdensome conditions in international markets.[106]

VII. COMMISSION ENFORCEMENT PROCEDURES DO NOT REQUIRE A FUNDAMENTAL SHIFT IN THE BURDEN OF PROOF (NPRM ¶¶ 94-107)

NYNEX earlier demonstrated that there was a need for the Commission to sharpen its requirements for Section 271-272 complaints, to be clear about its expectations for the production of information and to consider the adoption of ADR-type procedures, especially given the statutory 180-day timetable for addressing such complaints.[107] However, given the substantial prerequisite requirements for BOCs to gain entry into long distance service, there is no reason to shift to them a burden of disproving allegations of subsequent noncompliance. Indeed, this would also be contrary to fundamental notions of administrative law and due

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[105] MCI 68-71, citing In Request of MCI Communications Corp., British Telecommunications, plc. -- Joint Petition For Declaratory Ruling concerning Section 310(b)(4) and (d) Of The Communications Act Of 1934, as amended, Declaratory Ruling and Order, 9 FCC Rcd 3960 (1994). Therein, the Commission was concerned with the substantial ownership of a U.S. carrier by a significant foreign telecommunications carrier, which "could leverage its dominant position in both the U.K. international and local exchange markets to favor MCI and NEWCO [joint venture] to the disadvantage of competing U.S. international carriers." 9 FCC Rcd. at 3965. Moreover, much of the potential for anti-competitive conduct lay beyond the bounds of the Commission's direct regulatory jurisdiction. Here, there is generally no such foreign ownership or relationship. Foreign carriers and the BOC affiliates will bargain at arm's length for their own advantage, just as all other carriers do. There is no basis to conclude, as MCI does, that the BOCs have special leverage in such discussions.

[106] Some commenters also support the application of different regulatory treatment in the circumstances of RBOCs which have announced plans for merger. See, e.g., NYDPS. No such different treatment is required, as discussed supra (Section V. B). Further, with respect to dominant/nondominant Commission regulation, the affiliate is, and should be classified as a nondominant long distance carrier in all domestic long distance markets.

[107] NYNEX 64-76.

process. We address below the comments of others concerning the procedures for complaints filed pursuant to Section 271(d)(6).[108]

CompTel argues that a complainant has made out a *prima facie* complaint (justifying a shifting of the burden of proof) when it has plead facts which, if true, state a case.[109] For the reasons earlier expressed, particularly the short period for agency action, NYNEX believes that a complaint must satisfy certain threshold evidentiary standards, and that a BOC's answer to a complaint must meet similar standards.[110]

Several commenters support, to varying degrees, the Commission's tentative conclusion that the burden of proof in complaint proceedings should shift to the BOC once the complainant has made out a *prima facie* case (NPRM ¶¶ 101-103).[111] Such arguments are largely

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[108] NYNEX 62-63. Further, because Congress has provided ample statutory mechanisms to facilitate enforcement of Sections 271-272 within the terms of those provisions, there is no need for additional, burdensome reports (see Section III.A, supra). Sprint, for example, enumerates all of these existing "safeguards" (pp. 49-52). Importantly, these "safeguards" must be administered in a pro-competitive fashion in accordance with the direction of Congress. Thus, the Commission should not blindly accept the notion of TRA that audit data collected should be "made available" to competing carriers (p. 20). The Commission is well aware that the publication of proprietary business information can harm, not help, its pro-competitive mission.

[109] CompTel 29; see, also, LDDS WorldCom 30; TRA 21.

[110] NYNEX 66-70. NYNEX notes that both AT&T and Sprint support one of the crucial evidentiary standards advocated by NYNEX, i.e., that a complaint be accompanied by any documentation supporting the facts alleged which is available or can reasonably be obtained See AT&T 52; Sprint 55-56 & n. 36; see, also, MCI 53-54 (requiring complainant to make various quantitative and qualitative showings). This standard is also consistent with other provisions of the Act, such as Section 252(b)(2).

[111] See, generally, AT&T 50-51; CompTel 29-30; Teleport 21-22; LDDS 30; MCI 55-56; Time Warner 37-39.

unsupported, other than rhetorically. In contrast, Sprint appears to recognize that once a *prima facie* case is made, the BOC merely has the burden of going forward with rebuttal evidence.[112]

If the Commission first requires the complainant to establish a *prima facie* case as discussed above, NYNEX does not disagree with the suggestion that the burden of going forward with rebuttal evidence shifts to the BOC, i.e., the burden of production.[113] However, shifting the ultimate burden of proof to the BOC is not only violative of due process and contrary to analogous procedures before other agencies, but also puts the BOC in the unfair position of having to prove a negative.[114] None provide any legal support for the novel theories that a BOC should be considered guilty until it proves its innocence, or should be forced to carry a complainant's burden of persuasion for it.[115]

In spite of the wording of Section 271(d)(6), which provides three (and only three) possible remedies in the event a BOC ceases to meet any of the conditions required for

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[112] Sprint 55-56.

[113] Similarly, if the Commission requires the complainant to establish a *prima facie* case as discussed above, and places on the BOC the burden of going forward, NYNEX does not disagree that no presumption of reasonableness should attach in favor of the BOC. See CompTel 30; AT&T 51 n. 43; Teleport 22-23; LDDS 29-30; MCI 57. There is no basis in the Act, however, for Time Warner's contention that the establishment of a *prima facie* case should lead to a presumption that the BOC is culpable (pp. 37-39).

[114] NYNEX 70-74.

[115] Several parties argue some version of a "strict liability" theory for making a *prima facie* showing of discrimination, arguing that it is not necessary to show that such discrimination is unjust or unreasonable. See Sprint 57; MCI 56; TRA 21-22; Time Warner 37. However, these parties have not provided any explanation of the type of discrimination they believe would entitle a complainant to relief. Rather than prejudge inquiries which will be largely fact specific by adopting an ill-considered and sweeping standard, the Commission should approach this issue on a case-by-case basis.

authorization to provide in-region interLATA services, several parties insist that the generic provisions in Sections 206-209 allow private damages remedies.[116] NYNEX has already dealt with this in its comments.[117]

Finally, AT&T and MCI argue that no live hearing(s) should be required before an ALJ to resolve a complaint. NYNEX earlier rebutted this notion in its Comments.[118]

VIII. CONCLUSION

The NPRM in this proceeding continues a critical Commission effort -- begun with its BOC Out-of-Region Order -- to ensure that the BOCs and other LECs are permitted to provide intensified competition in the long distance markets as envisioned by Congress, subject only to specific conditions established in the 1996 Act. As above, many commenters ask the Commission instead to erect new barriers to effective market entry and establish elaborate regulatory requirements which would negate economic operating efficiencies and, perhaps, preclude effective competition entirely.

The Commission should not allow itself to be led down this path, even initially, especially as it has seen first hand in the Computer Inquiry proceeding how difficult it is to change the

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[116] See, AT&T 49; Teleport 22 n. 34; Sprint 55 & n. 35; TRA 20-21; MCI 52.

[117] NYNEX 64-65. Moreover, Congress clearly demonstrated, in Section 274(e), that it would separately authorize private rights of action against the BOCs under pre-existing Sections 206-209 -- when it wanted such private rights of action to exist. Congress's failure to do so in Section 271(d)(6) further demonstrates its intent that no such private remedy exists in complaint proceedings under that Section.

[118] NYNEX 74-75. AT&T also argues that sanctions against BOCs for anticompetitive behavior should be determined on a case-by-case basis, but suggests that such evaluations should be informed by two "principles" (p. 51). AT&T fails to offer any analytical support for these principles. Again, rather than prejudge inquiries which will be largely fact specific by adopting ill-considered and sweeping standards, the Commission should approach the question of sanctions on a case-by-case basis.

nature and direction of regulatory restrictions once they are adopted. Instead, it must focus in this proceeding on opening these markets now to greater competition, thereby ensuring the public interests of consumers in technological development, economic growth and increased choice, consistent with the *pro-competitive, de-regulatory national policy framework* designed by Congress, rather than the interests of competing incumbents.

Respectfully submitted,

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Dated: August 30, 1996

CERTIFICATE OF SERVICE

I, Susan Sonnenberg, hereby certify that on the 30th day of August, 1996, a copy of the foregoing NYNEX Reply Comments in Docket No. CC 96-149 was served on each of the parties listed on the attached Service List by first class U.S. mail, postage prepaid.

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